

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of:

ALEXANDER G.,

Claimant,

v.

HARBOR REGIONAL CENTER,

Service Agency.

OAH No. L 2007030442

DECISION

This matter was heard by Erlinda G. Shrenger, Administrative Law Judge, Office of Administrative Hearings, State of California, on June 4, 2007, in Torrance, California.

Gloria G., Claimant's grandmother and legal guardian (Grandmother), represented Claimant.

Steven Roberts, Manager of Rights Assurance, represented the Service Agency.

Oral and documentary evidence was received at the hearing, and the matter was submitted for decision on June 4, 2007.

ISSUE

Does Claimant have a developmental disability entitling him to eligibility for regional center services?

EVIDENCE RELIED UPON

Documentary: Service Agency's exhibits A-H; Claimant's exhibits 1-12.

Testimony: Kathleen Keon, M.A., Program Manager; Claimant's Grandmother.

FACTUAL FINDINGS

1. Claimant is an 11 year old boy on whose behalf regional center services from the Service Agency are requested. Grandmother asserted at the beginning of the hearing that she was not requesting a specific type of service, but only that she believed her grandson requires additional assistance with verbal expression, socializing with other children, and anger management. Grandmother expressed that Claimant does not know how to defend himself against teasing by other children at school and then gets blamed for making trouble.¹ Grandmother also has concerns about a possible diagnosis of autism.

2. By letter dated January 24, 2007, the Service Agency gave written notice of its denial of Claimant's request.² The Service Agency's staff concluded that Claimant does not have a qualifying developmental disability, such as mental retardation, cerebral palsy, autism or epilepsy, and that Claimant's diagnosis of Pervasive Developmental Disorder, Not Otherwise Specified (PDD-NOS) is not an eligible condition.

3. A Fair Hearing Request was submitted on Claimant's behalf on or about February 28, 2007, which timely appealed the Service Agency's denial of eligibility.

4. Claimant came to live with Grandmother when he was one and a half years old because his mother abandoned him. Since that time, Claimant has lived with Grandmother and has had only sporadic contact with his parents. Grandmother was appointed Claimant's legal guardian in 2001.

5. Claimant has no significant medical history of surgeries, illness, or hospitalizations. Claimant's mother and father both have a history of substance abuse. Grandmother reported that Claimant may have been exposed to drugs in-utero. Currently, Claimant is treated with albuterol for his asthma and Adderall XR for his Attention Deficit Hyperactivity Disorder (ADHD).

6. Claimant previously received regional center services through the Early Intervention Program. He was exited from the program when he turned three years old.

¹ The majority of the documents offered by Grandmother at the hearing relate to incidents of Claimant being teased by other students, Grandmother's request for a one-to-one aide, and Claimant's disciplinary history at school. Most of the documents are dated between March 2007 and June 2007.

² A notation on the letter indicates it was mailed on February 2, 2007.

7. Claimant presently attends Washington Elementary School in Redondo Beach, California, where he receives special education services. Claimant's primary eligibility category is specific learning disability, and his secondary eligibility category is other health impairment due to a diagnosis of ADHD. Claimant receives speech and language therapy twice a week and occupational therapy once a week. Claimant is reported to be doing well in school although he has had some social and behavioral difficulties.

8. Claimant was referred to the Service Agency by Harbor-UCLA Medical Center due to concerns about a possible diagnosis of autism. The Service Agency staff completed an initial intake assessment in August 2006. Subsequently, the Service Agency referred Claimant to licensed psychologist Thompson Kelly, Ph.D., for a psychological evaluation. Dr. Kelly evaluated Claimant on October 18 and 27, 2006, and prepared a written report of his findings. Grandmother accompanied Claimant to the evaluation sessions with Dr. Kelly.

9. In conducting his psychological evaluation of Claimant, Dr. Kelly reviewed school and medical records, interviewed Grandmother and Claimant, and utilized standardized tests and assessment tools. Dr. Kelly administered the Wechsler Intelligence Scales for Children-Fourth Edition (WISC-IV) and the Wide Range Achievement Test-Third Edition (WRAT-3) to evaluate Claimant's cognitive and academic skills; he used the Vineland Adaptive Behavior Scale-Second Edition (VABS-II) to evaluate Claimant's adaptive behavior; and he used the Autistic Diagnostic Observation Schedule-Module 3 (ADOS-3) to determine the presence, if any, of an autistic spectrum diagnosis.

10. Claimant's scores on the WISC-IV for verbal comprehension, perceptual reasoning, and processing speed were within the low average range, his score for working memory was in the mildly delayed range, and his full scale IQ score was within the borderline range of abilities. Claimant's scores on the WRAT-3 showed he performed within the borderline range of abilities on the Reading Test and within the low average range on the Arithmetic Test. Claimant's scores on the VABS-II showed his communication, daily living, and socialization skills were in the mildly delayed range. No significant gross or fine motor deficits were reported or observed.

11. Because Claimant was referred for evaluation to rule out an autistic spectrum diagnosis, Dr. Kelly observed Claimant using the ADOS-3, which is a standardized behavioral assessment used to elicit examples of social interaction, communication, and play skills for identifying autism. Dr. Kelly found that Claimant exhibited behaviors that could be associated with an autistic spectrum diagnosis, such as a restricted range of affect, perseverative interests, and an inability to have a reciprocal conversation with others. Dr. Kelly found that Claimant did not exhibit the stereotyped or repetitive verbal or physical mannerisms characteristic of a child with an autistic disorder. Claimant was able to participate in a joint task and reference different items pointed out to him, and he showed an interest in sharing his interest in reptiles with Dr. Kelly. In his school setting, Claimant is reported to be social with his peers and very imaginative and creative.

12. Based on his evaluation, Dr. Kelly diagnosed Claimant with PDD-NOS. Dr. Kelly opined that Claimant's behavior during the evaluation sessions and described in his school records was not consistent with an individual diagnosed with an autistic disorder. Although Claimant exhibited some characteristics that could be associated with an autistic disorder, Dr. Kelly's opinion is that those characteristics are the likely result of his early environmental deprivation and subsequent emotional difficulties and deficits in language development. Claimant experienced significant neglect in his early childhood from being abandoned by his mother and having little subsequent involvement with either of his parents.

13. An interdisciplinary team at the Service Agency reviewed Claimant's case on January 18, 2007. Among other things, the team considered Dr. Kelly's psychological evaluation of Claimant. The team concluded that Claimant did not meet the criteria of a qualifying developmental disability.

14. Claimant has been a client of Harbor-UCLA Medical Center Outpatient Psychiatry Clinic since November 6, 2002. Lian P. Chien, M.D., Child and Adolescent Psychiatry Fellow, has been Claimant's treating physician at the Outpatient Clinic since August 2, 2006. Dr. Chien treats Claimant one or two times per month.

15. At Grandmother's request, Dr. Chien wrote a letter to the Service Agency dated April 30, 2007. In the letter, Dr. Chien wrote that she and Grandmother "would like to know if [Claimant] would qualify for services at the Harbor Regional Center under the diagnosis of Pervasive Developmental Disorder Not Otherwise Specified." Dr. Chien explained that she reviewed Dr. Kelly's psychological evaluation of Claimant and agreed with "many of the observations and results of the psychological testing." Specifically, Dr. Chien agreed with the observations that Claimant exhibited a "perseverative interest in lizards, poor eye contact, [and] difficulties in sustaining an interactive conversation on topics other than his pet lizards." Dr. Chien, however, did not express any opinion about Dr. Kelly's diagnosis of PDD-NOS.

16. Claimant presented no evidence of an evaluation by Dr. Chien or any other doctor showing a diagnosis of autism or other qualifying condition for regional center services. As established by her testimony at hearing, Grandmother does not dispute Dr. Kelly's diagnosis of PDD-NOS.

LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code § 4500 et seq.) An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act to appeal a contrary regional center decision. (Welf. & Inst. Code, §§ 4700-4716.) Claimant properly and timely requested a hearing and therefore jurisdiction for this appeal was established. (Factual Findings 1-3.)

2. Claimant has the burden of proof as to each fact necessary to establish his eligibility for services provided by the Service Agency. (Evid. Code, § 500.) The standard of proof in this case requires proof to a preponderance of the evidence, pursuant to Evidence Code section 115, because no other law or statute (including the Lanterman Act) requires otherwise. (Factual Findings 1-3.)

3. An applicant is eligible for services under the Lanterman Act if he can establish he is suffering from a substantial disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or what is commonly referred to as the “fifth category” (a condition similar to mental retardation or which requires treatment similar to that required by those who are mentally retarded). (Welf. & Inst. Code, § 4512, subd. (a).) A qualifying condition must also onset before one’s 18th birthday and continue indefinitely thereafter. (Welf. & Inst. Code, § 4512.)

4. Excluded from eligibility are handicapping conditions that are solely psychiatric disorders, learning disabilities, or disorders solely physical in nature. (Cal. Code Regs., tit. 17, § 54000, subd. (c).) If a claimant’s condition is *solely* caused by one of these three “handicapping conditions,” he or she is not entitled to eligibility. “Learning disorders” are defined as a significant discrepancy between estimated cognitive potential and actual level of educational performance that is not “the result of generalized mental retardation, educational or psycho-social deprivation, [or] psychiatric disorder” (Cal. Code Regs., tit 17, § 54000, subd. (c)(2).)

5. With regard to the issue of one’s eligibility for regional center services, “the Lanterman Act and implementing regulations clearly defer to the expertise of the DDS [California Department of Developmental Services] and RC [regional center] professionals and their determination as to whether an individual is developmentally disabled.” (*Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1129.) In *Mason*, the court focused on whether the claimant’s expert witnesses’ opinions on eligibility “sufficiently refuted” those expressed by the regional center’s experts that claimant was not eligible. (*Id.*, at p. 1137.)

6. The evidence did not establish Claimant has a developmental disability that meets the statutory requirements for eligibility for regional center services. Claimant’s diagnosis of PDD-NOS is not an eligible condition. (Welf. & Inst. Code § 4512, subd. (a); Cal. Code Regs., tit. 17, § 54000.) No evidence was offered by Claimant to refute the PDD-NOS diagnosis by Dr. Kelly. No evidence was offered to establish that Claimant has been diagnosed with autism or any other qualifying condition.

7. Accordingly, the evidence did not establish Claimant is developmentally disabled to qualify for regional center services, by reason of Factual Findings 4-16 and Legal Conclusions 2-6.

ORDER

The Harbor Regional Center's determination that Claimant is not eligible for services is sustained. Claimant's appeal is denied.

DATED: June 15, 2007

ERLINDA G. SHRENGER
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter and both parties are bound by this Decision. Either party may appeal this Decision to a court of competent jurisdiction within 90 days.